

1 RYAN S. BENYAMIN, State Bar No. 322594
2 WILSON SONSINI GOODRICH & ROSATI
3 Professional Corporation
4 1900 Avenue of the Stars, 28th Floor
5 Los Angeles, California 90067
Telephone: (424) 446-6913
Facsimile: (866) 974-7329
rbenyamin@wsgr.com

JASON MOLICK (*pro hac vice*)
JEREMY P. AUSTER (*pro hac vice*)
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: (212) 999-5800
Facsimile: (212) 999-5899
jmollick@wsgr.com
jauster@wsgr.com

Counsel for Defendant Google LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

15 DAVID STEBBINS,) CASE NO.: 3:23-cv-00322-TLT
16 Plaintiff,)
17 v.) **MOTION TO DISMISS AND TO
18** DECLARE PLAINTIFF A
19 GOOGLE LLC,) VEXATIOUS LITIGANT
20 Defendant.)
21) Judge: Hon. Trina L. Thompson
22) Date: June 13, 2023
23) Time: 2:00 p.m.
24) Action Filed: January 20, 2023
25)

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NOTICE OF MOTION

2 **PLEASE TAKE NOTICE** that on June 13, 2023 at 2:00 p.m., or as soon thereafter as the
3 matter may be heard, in the United States District Court, Northern District of California, San
4 Francisco Courthouse, Courtroom 9, Floor 19, located at 450 Golden Gate Avenue, San Francisco,
5 California 94102, before the Honorable Tina L. Thompson, Defendant Google LLC (“Google”)
6 will and hereby does move the Court to dismiss this case with prejudice pursuant to Federal Rule
7 of Civil Procedure 12(b)(6), and to declare Plaintiff a vexatious litigant. This Motion is based on
8 the below Memorandum of Points and Authorities, the accompanying Declarations of Neha Reddy
9 and Jason Mollick, Esq., the pleadings and records on file in this action, all other matters of which
10 this Court may take judicial notice, and such other argument as may be heard by the Court.

INTRODUCTION

12 Plaintiff David Stebbins—a *pro se* individual who posts videos on YouTube under the alias
13 “Acerthorn”—is a federally-recognized vexatious litigant with a history of filing frivolous and
14 abusive lawsuits across the country. In recent years he has set his sights on this District, filing
15 bogus “copyright infringement” lawsuits for millions of dollars against virtually anyone who posts
16 or displays the slightest amount of his content for purposes of criticizing him. In each case he is
17 granted *in forma pauperis* status, racking up thousands of dollars in unpaid filing fees.

18 These lawsuits have had a predictable Streisand Effect.¹ Instead of muting critics as he
19 hoped, Plaintiff has cultivated an even-louder chorus of online users who ridicule his litigious
20 behavior. As the Honorable Jeffrey S. White noted in dismissing one of his many cases, “Plaintiff
21 clearly feels aggrieved by comments made about him online . . . , but that does not mean Plaintiff
22 has a viable copyright claim.” *Stebbins v. Polano*, No. 21-cv-04184-JSW, 2022 WL 2668371, at
23 *5 (N.D. Cal. July 11, 2022) (“*Polano*”). Judge White also ruled, in dismissing another case of
24 the same ilk, that “much of the alleged infringement is plainly fair use,” and that Plaintiff’s
25 repeated “attempt to manufacture and pursue ultimately meritless copyright infringement claims

²⁷ ¹ “[A] phenomenon whereby the attempt to suppress something only brings more attention or notoriety to it.” Merriam-Webster, *Words We’re Watching: “Streisand Effect”*, <https://www.merriam-webster.com/words-at-play/words-were-watching-streisand-effect-barbra>.

1 in an effort to silence online criticism smacks of bad faith and abuse of the Court system.” *Stebbins*
 2 *v. Rebolo*, No. 22-cv-00546-JSW, 2022 WL 2668372, at *3 (N.D. Cal. July 11, 2022) (“*Rebolo*”).
 3 In the last year alone, Plaintiff has been warned at least *six times* “that if he persists in filing
 4 frivolous or meritless lawsuits, the Court may impose sanctions, bar him from filing further actions
 5 without prior approval, and/or deem him a vexatious litigant.” *Id.*; *accord Polano*, 2022 WL
 6 2668371, at *5 (issuing same warning); *Polano*, Dkts. 134 at 1, 143 at 1-2, and 147 at 2 (same);
 7 *Rebolo*, Dkt. 19 at 2 (same).

8 Plaintiff is not heeding these warnings. A third-party user of Google’s YouTube service
 9 created a channel devoted to criticizing Plaintiff, and posted a small picture of Plaintiff’s face as
 10 an icon for the channel, superimposed with the phrase “ACERTHORN LAWS”—an unmistakable
 11 reference to Plaintiff’s abuse of the legal system. Plaintiff sued Google, claiming the picture of
 12 his face is a snapshot from a four-hour video that he registered with the United States Copyright
 13 Office. He charges Google with alleged “copyright infringement,” demands \$150,000 in damages,
 14 and seeks an injunction requiring Google to permanently ban the user who dared to mock him.

15 This is exactly the sort of “bad faith and abuse of the Court system” that Judge White
 16 warned about—indeed in the *Rebolo* case, the court dismissed an *identical* instance of supposed
 17 “infringement” by a different user. One would struggle to imagine a more obvious case of “fair
 18 use” under the four-factor test set forth in Section 107 of the Copyright Act: (1) the sole purpose
 19 of the allegedly infringing channel icon is to criticize and comment on Plaintiff’s behavior, a
 20 classic transformative use that is safeguarded by law; (2) the allegedly infringed video is of
 21 minimal, if any, creativity; (3) the icon uses merely a split-second frame of a four-hour video; and
 22 (4) the use of that screenshot has no impact whatsoever on the market for Plaintiff’s copyrighted
 23 video or any derivatives from that video, if there is such a market at all. This Court should dismiss
 24 Plaintiff’s claim with prejudice on fair use grounds, as Judge White did in *Rebolo*.

25 More is needed, however. Plaintiff has demonstrated that he will continue to burden this
 26 District with frivolous and wasteful lawsuits. He has ignored repeated warnings to think carefully
 27 before filing. And the more abusive lawsuits he brings, the more other YouTubers will criticize
 28 him, resulting in even more lawsuits, and so on. This wasteful cycle will continue until this Court

1 declares Plaintiff a vexatious litigant (as his home district has already done), subjects him to a pre-
 2 filing screening order, and denies *in forma pauperis* status in future cases.

3 **BACKGROUND**

4 **A. Plaintiff is a Federally-Recognized Vexatious Litigant With a Decade-Long
 5 History of Filing Frivolous Lawsuits and Wasting Judicial Resources**

6 Plaintiff goes by the online alias “Acerthorn.” Dkt. 5 (Compl.) ¶ 1. His YouTube channel
 7 includes numerous videos depicting gameplay footage of various video games, with Plaintiff
 8 providing voice-over review and analysis of the games. *Id.* (linking to Plaintiff’s YouTube
 9 channel, available at <https://www.youtube.com/@Acerthorn>).

10 Plaintiff is widely ridiculed by users on YouTube and other platforms, in large part because
 11 of his years’-long abuse of the court system and the notice-and-takedown procedures under the
 12 Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(c). Plaintiff has been deemed a
 13 vexatious litigant, and numerous federal courts have dismissed his lawsuits as frivolous. In this
 14 District, for example, he once sued Google to confirm a purported “arbitration award” for half a
 15 trillion dollars, even though no arbitration actually occurred. *Stebbins v. Google, Inc.*, 2011 WL
 16 5150879 (N.D. Cal. Oct. 27, 2011) (dismissing *sua sponte* as “frivolous” and “clearly baseless”).
 17 There are many other suits as fantastical as that one. See *Stebbins v. Texas*, 2011 WL 6130403, at
 18 *3 (N.D. Tex. Oct. 24, 2011) (warning Plaintiff could face monetary sanctions and/or that the court
 19 would ban him from filing further actions without prior approval); *Stebbins v. Steen*, 2013 WL
 20 4496494, at *2 (E.D. Ark. Aug. 20, 2013) (concluding Plaintiff’s complaint was frivolous and
 21 failed to state a claim); *Stebbins v. Stebbins*, 575 F. App’x 705, 705 (8th Cir. 2014) (affirming
 22 dismissal and noting it is “undisputed that Stebbins has proceeded in forma pauperis on at least
 23 sixteen complaints [as of 2014] that proved meritless, and has filed numerous frivolous motions”);
 24 *Stebbins v. Bradford*, 2013 WL 3366289, at *3 (W.D. Ark. July 5, 2013) (dismissing Plaintiff’s
 25 complaint as frivolous), *aff’d*, 552 F. App’x 606 (8th Cir. 2014). Plaintiff has also filed **three**
 26 baseless mandamus petitions in the Ninth Circuit, all of which were denied in one-page orders.
 27 See 9th Cir. Cases: *Stebbins v. USDC-CASJ*, No. 11-72595 (9th Cir. Sept. 2, 2011), *Stebbins v.*
 28

¹ *USDC-CAOAK*, No. 22-70132 (9th Cir. June 28, 2022), and *Stebbins v. USDC-CAOAK*, No. 22-70269 (9th Cir. Dec. 13, 2022); *see also infra* at 21-22.

Plaintiff has been reprimanded on countless occasions, but he persists in abusing the legal system, draining judicial and party resources, and accumulating thousands of dollars in waived filing fees. One federal court noted that “time spent dealing with Mr. Stebbins’s filings prevents the Court from addressing the genuine, vexing problems that people trust the Court to resolve quickly and fairly.” *Stebbins v. Microsoft, Inc.*, 2012 WL 12896360, at *1 (W.D. Wash. Jan. 13, 2012), *aff’d*, 520 F. App’x 589 (9th Cir. 2013). Similarly, the Western District of Arkansas (Plaintiff’s home district) declared him a “vexatious” litigant who has “abused the system” with “a history of filing ultimately meritless cases upon which the Court has been forced to expend countless hours of time and judicial resources. Not only has Plaintiff filed numerous cases, but he has also filed over one hundred motions within those cases, some of which have been repetitive, and few of which have had any merit.” *Stebbins v. Stebbins*, 2013 WL 6182991, at *1 (W.D. Ark. Nov. 26, 2013). When that court limited Plaintiff to filing one case per every three months (*id.* at *3), he evaded the order by filing new complaints in the *Eastern* District, and then attempted to transfer those cases to the Western District. *Stebbins v. Hixson*, 2018 WL 2124106, at *1, *3 (W.D. Ark. May 8, 2018).

B. In Recent Years, Plaintiff Has Filed a Barrage of Bogus Copyright Claims Against Google and YouTube in An Effort to Silence His Online Critics

In June 2021, Plaintiff sued Google’s parent company, Alphabet Inc., for hosting purportedly “infringing” user content on YouTube, which is operated by Google. He complained that users of YouTube and other online platforms had ridiculed him by posting copies of an “accidental livestream” in which his computer camera broadcast him online without his knowledge. *Polano*, 2022 WL 2668371, at *1. Plaintiff found this video to be embarrassing, and sought to manufacture a way to sue the users and compel YouTube to remove it. To that end, Plaintiff seized on abusing copyright law. First, he applied to register the accidental livestream with the United States Copyright Office as a “dramatic work,” without disclosing that the video had actually been created due to a software glitch without any creativity on his part—a

1 fundamental requirement for any copyrighted work. *Id.* at *4. Once he obtained the registration,
 2 he sued Alphabet and the other defendants for “copyright infringement,” demanded over a million
 3 dollars in damages from the users, and sought an injunction compelling Alphabet to ban them
 4 permanently from YouTube. *See Polano*, Dkts. 1, 55 (original Complaint and SAC).

5 Plaintiff did not stop there. A few months later, in January 2022, he filed a related suit
 6 against Alphabet, YouTube, Discord, Twitch, and at least eight YouTube users who had posted
 7 videos criticizing his litigious behavior and abuse of the DMCA takedown process. Plaintiff
 8 claimed dozens of additional “copyright infringements” for virtually every instance where anyone
 9 used pieces of his content to criticize him—including de minimis snippets of the accidental
 10 livestream, displays of his YouTube channel logo, the sounds of his voice, and screenshots of his
 11 face. *See generally Rebolo*, 2022 WL 2668372; *Rebolo*, Dkts. 1, 15 (original Complaint and FAC).
 12 For example—and directly relevant here—he sued one user for creating a YouTube channel
 13 designed to criticize him which used a picture of his face for a channel icon. *Id.* Dkt. 15 ¶ 128.
 14 Plaintiff claimed this was “infringement” because the picture was screenshotted from one of his
 15 copyrighted videos. *Id.* He also sought leave to add infringement claims against a user operating
 16 a channel called “Acerthorn The True Acerthorn”—the same channel that is alleged to be the direct
 17 infringer here. *Id.* Dkt. 16-1 ¶¶ 154-59. For these supposed “infringements” Plaintiff sought \$3.5
 18 million in damages, plus (as in *Polano*) injunctive relief requiring YouTube to ban all user-
 19 defendants from the platform. *Id.* Dkt. 15 at 33.

20 Judge White dismissed the *Polano* case with prejudice, finding (among other things) that
 21 the accidental livestream was not copyrightable and that “Plaintiff’s registration application
 22 contained inaccurate and incomplete information.” 2022 WL 2668371, at *4. Judge White
 23 summarized the case as follows:

24 Plaintiff clearly feels aggrieved by comments made about him
 25 online by the Individual Defendants and others, but that does not
 26 mean Plaintiff has a viable copyright claim. He does not, and his
 27 pursuit of his claim has caused the Court to expend significant
 28 resources addressing his meritless claims. Plaintiff is warned that if

1 he persists in filing frivolous or meritless lawsuits, the Court may
 2 impose sanctions, bar him from filing further actions without prior
 3 approval, and/or deem him a vexatious litigant.

4 *Id.* at *5.²

5 Judge White also dismissed the related *Rebolo* case in a screening order under 28 U.S.C. §
 6 1915(e)(2)(B) (authorizing a court to dismiss an *in forma pauperis* action at any time if it finds
 7 that the plaintiff “fails to state a claim on which relief may be granted” or that the action is
 8 “frivolous or malicious”). The court issued the same warning as in *Polano*, noting specifically
 9 that Plaintiff was improperly targeting “plainly fair use criticism” with bad-faith litigation:

10 [M]uch of the alleged infringement is plainly fair use criticism as
 11 Plaintiff himself concedes in the complaint. Thus, amendment
 12 would be futile.... Plaintiff’s attempt to manufacture and pursue
 13 ultimately meritless copyright infringement claims in an effort to
 14 silence online criticism ***smacks of bad faith and abuse of the Court***
 15 ***system.*** Plaintiff’s bad faith and his history of filing frivolous
 16 lawsuits further justifies dismissal without leave to amend....
 17 Plaintiff is warned that if he persists in filing frivolous or meritless

19 ² This was not the first time Judge White warned Plaintiff that he risked being declared a vexatious
 20 litigant. Several months earlier, Plaintiff attempted to evade a ruling on the validity of his alleged
 21 copyright by rushing to dismiss Alphabet from *Polano* under Federal Rule of Civil Procedure
 22 41(a), because he learned that Alphabet intended to present evidence that he had not been forthright
 23 in his application to register the copyright. Plaintiff filed a notice of dismissal just minutes before
 24 Alphabet filed its motion to dismiss, then promptly moved to strike Alphabet’s motion, imploring
 25 the court to “do whatever it takes to cast the contents [of the copyrightability arguments] from its
 26 mind” and “assum[e] the copyright’s validity to be unchallenged.” *Polano*, Dkt. 135 at 3; *id.* Dkts.
 27 128, 129, 130; *see also Polano*, 2022 WL 2668371, at *1. The court struck Alphabet’s motion,
 28 but warned that it “does not endorse Plaintiff’s efforts to manipulate the litigation process and his
 blatant gamesmanship. Should Plaintiff continue to dismiss and refile cases in bad faith to obtain
 a different result, ***he risks being declared a vexatious litigant in this district.***” *Polano*, Dkt. 134
 at 1 (emphasis added). Alphabet reintervened, however, on the grounds that the copyrightability
 issue was common to the *Rebolo* action where it remained a defendant. The court allowed
 intervention in light of “Plaintiff’s abuse of the litigation process and his attempt to evade a ruling
 on an essential question at the core of both cases[.]” 2022 WL 2668371, at *3.

1 lawsuits, the Court may impose sanctions, bar him from filing
 2 further actions without prior approval, and/or deem him a vexatious
 3 litigant.

4 2022 WL 2668372, at *3 (emphasis added).

5 Plaintiff subsequently filed motions for reconsideration and for relief from the judgments
 6 in both actions, which remain pending. *See Polano*, Dkts. 159, 162; *Rebolo*, Dkts. 21, 23.

7 **C. Plaintiff's Latest Copyright Lawsuit is Yet Another Waste of Judicial
 8 Resources Over Fair Use Criticism**

9 The present lawsuit is Plaintiff's latest attempt to wield copyright law as means of stifling
 10 fair use criticism. Plaintiff alleges that on May 16, 2021, he recorded a livestream that he later
 11 uploaded to YouTube. Compl. ¶ 5. Plaintiff registered this livestream with the Copyright Office.
 12 *Id.* ¶ 10. The video, titled "Livestream – Acerthorn's Credibility as a Reviewer (w/ Montyspa on
 13 Co-Commentary)," is nearly four hours long and can be found at the following URL:
 14 <https://www.youtube.com/watch?v=iDKSx4oi-r0> (the "Livestream"). *Id.* ¶ 1. Plaintiff asserts that
 15 at some point during the Livestream—between timestamps 2:17:55 to 2:18:23—he can be seen
 16 "giving a smug smile while I put my fingers together in a very smug manner." *Id.* ¶ 8. A screenshot
 17 from that snippet is depicted below:



23 According to Plaintiff's own allegations, a third-party individual created a YouTube
 24 channel called "Acerthorn The True Acerthorn" which, like many others, was dedicated to
 25 criticizing him. Compl. ¶ 11. The channel was formerly available on YouTube at
 26 <https://www.youtube.com/@acerthornthetrueacerthorn4532>, but the user removed it after Plaintiff
 27 filed this lawsuit. *Id.* ¶ 11; Reddy Decl. ¶ 2. Although Plaintiff claims that the channel was
 28 "harassing," he concedes elsewhere in the Complaint that the channel also provided

1 “transformative” “criticism and commentary” about him. Compl. ¶¶ 11, 41. As part of the channel
 2 presentation, the channel utilized a small, circular icon that Plaintiff alleges was “clearly a snapshot
 3 of the ‘smug face’” depicted in the Livestream. *Id.* ¶ 12. A copy of the image that was used for
 4 the icon (which Google has preserved) is below:



11 Reddy Decl. Ex. A.³ A copy of the “channel art” that appeared behind the icon (as Plaintiff alleges
 12 in Paragraph 41 of the Complaint) is below:



18 Reddy. Decl. Ex. B. To show the context of the channel where the image was displayed, a
 19 screenshot of the Acerthorn The True Acerthorn channel homepage, taken by the WayBack
 20 Machine Internet Archive, is depicted in Exhibit A to the Mollick Declaration.⁴

21 Plaintiff acknowledges that the image at issue contains “additions” to what is depicted in
 22 his Livestream, including “subtitles that contain the words ‘Acerthorn’ and ‘laws’” and “part of
 23

24³ As Plaintiff alleges, the icon as it appeared on the channel was circular and thus cropped out the
 25 squared edges depicted above. Compl. ¶ 12. The image shown above is the manner in which it is
 preserved by Google’s systems. Reddy Decl. ¶ 3.

26⁴ The WayBack Machine (available at <https://archive.org/web/>) captures still-images of websites
 27 as they appeared at certain points in the past. The image shown in Exhibit A to the Mollick
 Declaration is the most recent image available before the channel was taken down. We were
 28 unable to locate a WayBack image that includes the icon at issue. Mollick Decl. ¶ 4.

1 another man's face." Compl. ¶ 36. The red background of the image also differs from the
 2 background in Plaintiff's Livestream. Nonetheless, Plaintiff alleges that the image is a "prima
 3 facie copyright infringement" of the Livestream. *Id.* ¶ 22. And, anticipating the obvious
 4 deficiencies in his claim, he spends several pages in the Complaint defensively arguing that the
 5 image is not a fair use under the Copyright Act. *Id.* ¶¶ 35-51.

6 As Plaintiff alleges, Google is the parent company of YouTube, and hosted the allegedly
 7 infringing image that appeared on the Acerthorn The True Acerthorn channel. Compl. ¶ 16. On
 8 that basis he asserts a claim against Google for vicarious copyright infringement. *Id.* ¶ 34. He
 9 demands \$150,000 in statutory damages and an injunction ordering Google to ban the channel
 10 operator from YouTube permanently. *Id.* ¶¶ 52-56.

11 ARGUMENT

12 I. COURTS ROUTINELY DISMISS COPYRIGHT INFRINGEMENT CLAIMS 13 THAT TARGET FAIR USE CRITICISM

14 "To establish secondary infringement, [a plaintiff] must first demonstrate direct
 15 infringement." *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 937 (9th Cir. 2010);
 16 *accord, e.g., Kifle v. YouTube LLC*, No. 21-cv-01752-CRB, 2021 U.S. Dist. LEXIS 193604, at *12
 17 (N.D. Cal. Oct. 5, 2021) ("To show secondary infringement (i.e., 'contributory' or 'vicarious'
 18 infringement), a plaintiff must first 'establish that there has been direct infringement by third
 19 parties.'") (citation omitted). Thus, to prevail on his vicarious infringement claim against
 20 Google—a form of secondary infringement—Plaintiff must establish that the Acerthorn The True
 21 Acerthorn channel directly infringed his copyright in the Livestream.

22 Section 107 of the Copyright Act, 17 U.S.C. § 107, provides that "the fair use of a
 23 copyrighted work, including such use by reproduction in copies ... for purposes such as criticism
 24 [or] comment, ... is not an infringement of copyright." This doctrine "confers a privilege on people
 25 other than the copyright owner to use the copyrighted material in a reasonable manner without his
 26 consent, notwithstanding the monopoly granted to the owner." *Hustler Magazine, Inc. v. Moral
 27 Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986). Accordingly, if the challenged image is a fair
 28

1 use of Plaintiff's Livestream, then the Acerthorn The True Acerthorn channel has not directly
 2 infringed Plaintiff's copyright and Google cannot be liable for secondary infringement.

3 "Fair use is a mixed question of law and fact." *Google LLC v. Oracle Am., Inc.*, 141 S. Ct.
 4 1183, 1214 (2021) (cleaned up). Nonetheless, courts routinely dismiss copyright infringement
 5 claims under Rule 12(b)(6) where it is apparent on the face of the complaint that the alleged
 6 conduct is fair use. *See, e.g., Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 530 (9th Cir.
 7 2008) (the "assertion of fair use may be considered on a motion to dismiss ... when no material
 8 facts are in dispute"); *Sedgwick Claims Mgmt. Servs. v. Delsman*, 2009 WL 2157573, at *4 (N.D.
 9 Cal. July 16, 2009) (dismissing infringement claim on fair use grounds where defendant used
 10 plaintiff's copyrighted headshots to criticize its executives' business practices); *Savage v. Council*
 11 *on American-Islamic Relations, Inc.*, 2008 WL 2951281, at *9-10 (N.D. Cal. Jul. 25, 2008)
 12 (dismissing infringement claim on fair use grounds where defendants posted audio excerpts of
 13 plaintiff's radio program for purposes of criticizing plaintiff).⁵

14 In considering fair use on a motion to dismiss, the Court may consider "materials
 15 incorporated into the complaint by reference, and matters of which the court may take judicial
 16 notice." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008)
 17 (citation omitted). That includes Plaintiff's Livestream, the Acerthorn The Truth Acerthorn
 18 channel, and the allegedly infringing image—all of which are referenced, described, and
 19 hyperlinked in the Complaint. Compl. ¶¶ 5-14; *accord, e.g., Savage*, 2008 WL 2951281, at *2
 20 (considering allegedly infringing content referenced in complaint on a 12(c) motion as to fair use);

21

22 ⁵ *See also, e.g., City of Inglewood v. Teixeira*, 2015 WL 5025839, at *6 (C.D. Cal. Aug. 20, 2015)
 23 (dismissing infringement claim on fair use grounds where defendant used only "brief portions of
 24 the larger works in order to comment on, and criticize [plaintiff's] political activities"); *Burnett v.*
25 Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962, 967-72 (C.D. Cal. 2007) (dismissing
 26 infringement claim on fair use grounds when defendant's comedy show, Family Guy, created a
 27 parody of plaintiff's copyrighted character and theme music); *DraftExpress, Inc. v. Whistle Sports,*
28 Inc., 2022 WL 16962285, at *5 (C.D. Cal. Aug. 2, 2022) (dismissing infringement claim on fair
 use grounds where defendant utilized two seconds of a three minute video showing footage of a
 professional basketball star), *appeal filed*, No. 22-56188 (9th Cir. Dec. 20, 2022); *Hughes v.*
Benjamin, 437 F. Supp. 3d 382, 389 (S.D.N.Y. 2020) (dismissing infringement claims concerning
 YouTube videos on fair use grounds where defendant used portions of plaintiff's own YouTube
 videos for purposes of criticizing her).

1 *DraftExpress*, 2022 WL 16962285, at *1 nn.1, 3 (taking judicial notice of original and allegedly-
 2 infringing videos that were referenced but not attached to complaint); *City of Inglewood*, 2015 WL
 3 5025839, at *1-3 (taking judicial notice of allegedly infringing YouTube videos referenced in
 4 complaint); *Hughes*, 437 F. Supp. 3d at 386 n.1 (considering YouTube videos on a 12(b)(6) motion
 5 based on fair use because the videos were “incorporated by reference into the Complaint”).

6 Additionally, because Plaintiff is proceeding *in forma pauperis* (Dkt. 6), this Court retains
 7 authority under 28 U.S.C. § 1915(e)(2)(B) to dismiss the case at any time if it determines that the
 8 action is frivolous, malicious, or fails to state a claim on which relief may be granted. “[T]he *in*
 9 *forma pauperis* statute, unlike Rule 12(b)(6), accords judges not only the authority to dismiss a
 10 claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil
 11 of the complaint’s factual allegations and dismiss those claims whose factual contentions are
 12 clearly baseless. Thus, the court is not bound, as it usually is when making a determination based
 13 solely on the pleadings, to accept without question the truth of the plaintiff’s allegations.” *Denton*
 14 *v. Hernandez*, 504 U.S. 25, 32 (1992) (citation omitted; cleaned up).

15 Indeed, in *Rebolo*, Judge White dismissed virtually identical infringement claims in a
 16 Section 1915 screening order. As noted, that case included allegations that a channel icon was
 17 infringing because it used a screenshot of Plaintiff’s face from a different copyrighted video—the
 18 same conduct that he alleges here. *Rebolo*, Dkt. 15 ¶ 128. Plaintiff also raised allegations in
 19 *Rebolo* concerning the same Acerthorn The True Acerthorn channel that is accused of being the
 20 direct infringer here. *Id.* Dkt. 16-1 ¶¶ 154-59. The court found that this was “plainly fair use
 21 criticism,” and that “Plaintiff’s attempt to manufacture and pursue ultimately meritless copyright
 22 infringement claims in an effort to silence online criticism smacks of bad faith and abuse of the
 23 Court system.” 2022 WL 2668372, at *3. The same order of dismissal is warranted now—except
 24 this time, instead of “warn[ing]” Plaintiff against filing such “frivolous” claims (*id.*), this Court
 25 should impose sanctions by declaring him a vexatious litigant and subjecting him to a filing bar.

26 **II. THE CHANNEL’S IMAGE IS A FAIR USE OF PLAINTIFF’S LIVESTREAM**

27 Section 107 of the Copyright Act identifies four factors that a court must consider in
 28 determining fair use: (1) “the purpose and character of the use, including whether such use is of a

1 commercial nature or is for nonprofit educational purposes”; (2) “the nature of the copyrighted
 2 work”; (3) “the amount and substantiality of the portion used in relation to the copyrighted work
 3 as a whole”; and (4) “the effect of the use upon the potential market for or value of the copyrighted
 4 work.” “The four factors are to be considered together in light of the purposes of copyright, not
 5 in isolation.” *Sony Comput. Ent’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1026 (9th Cir. 2000)
 6 (citation omitted). “Not all factors must be met in order for the Court to make a determination of
 7 fair use.” *Sedgwick*, 2009 WL 2157573, at *4.

8 As discussed below, all of the factors weigh heavily in favor of fair use here, based on the
 9 face of the Complaint and the materials incorporated therein by reference.

10 **A. Factor 1: Purpose and Character of the Challenged Use**

11 The first factor considers “the purpose and character of the use, including whether such use
 12 is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). This
 13 inquiry turns in large part on “whether the copier’s use adds something new, with a further purpose
 14 or different character, altering the copyrighted work with new expression, meaning or message.”
 15 *Oracle*, 141 S. Ct. at 1202 (cleaned up; citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,
 16 579 (1994)). Courts “have used the word ‘transformative’ to describe a copying use that adds
 17 something new and important.” *Id.* at 1203. “Although [a] transformative use is not absolutely
 18 necessary for a finding of fair use, … the goal of copyright, to promote science and the arts, is
 19 generally furthered by the creation of transformative works. Such works thus lie at the heart of
 20 the fair use doctrine’s guarantee of breathing space within the confines of copyright, … and the
 21 more transformative the new work, the less will be the significance of other factors … that may
 22 weigh against a finding of fair use.” *Campbell*, 510 U.S. at 579 (citation omitted).

23 Of particular importance here, “[Section] 107 expressly permits fair use for the purposes
 24 of criticism and comment.” *Hustler*, 796 F.2d at 1153; *see also* 17 U.S.C. § 107. “[W]orks that
 25 comment and criticize … are by their nature often sufficiently transformative to fit clearly under
 26 the fair use exception.” *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 800 (9th Cir. 2003)
 27 (citing *Campbell*, 510 U.S. at 579); *see also*, e.g., *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 42
 28

1 (S.D.N.Y. 2017) (“[C]ourts have regularly found fair use after holding that the purpose or character
 2 of an allegedly infringing work was criticism and/or comment.”).

3 It is readily apparent from the face of the Complaint, and the materials incorporated by
 4 reference, that the allegedly-infringing image is a transformative use of Plaintiff’s Livestream for
 5 the sole purpose of criticizing and commenting on his behavior. The image superimposes the
 6 phrase “ACERTHORN LAWS” around the screenshot of Plaintiff’s face—an unmistakable
 7 reference to his abuse of copyright law and the judicial system. This is also readily apparent from
 8 the broader context of the Acerthorn The True Acerthorn channel where the image appeared.
 9 Plaintiff concedes that the channel provided “criticism and commentary” about him, including by
 10 mocking his physical appearance through channel art that he admits is “transformative.” Compl.
 ¶ 41. Several video titles accused Plaintiff of being a “doxxer” and “sub botting”—practices
 11 frowned upon by the online community. *See Mollick Decl. Ex. A* (screenshot of channel). The
 12 channel also recommended that visitors view content posted by other YouTube users Plaintiff has
 13 sued in the past for criticizing him, whom it dubs “Acerthorn’s Archenemies.” *Id.* These include
 14 users that are known by aliases SidAlpha, Enclave Emily, Creetosis, and SofiannP—all of whom
 15 are defendants in the *Polano* and/or *Rebolo* cases. *Id.* The channel also referenced an “Alternate
 16 Channel” that similarly criticizes Plaintiff’s litigiousness, including with a parodic threat of
 17 “gimme money … or I’ll sue you.” *Id.* Any visitor would instantly recognize that this content—
 18 while crude at times—is critical commentary. *See Hughes*, 437 F. Supp. 3d at 391-2 (finding that
 19 the “critical nature” of an allegedly infringing YouTube video was “apparent from the broader
 20 context of [defendant’s] YouTube channel,” including because “a reasonable observer who came
 21 across the video would quickly grasp its critical purpose”).
 22

23 Such criticism is unquestionably transformative, as courts confronting similar facts have
 24 repeatedly held. *See, e.g., Sedgwick*, 2009 WL 2157573, at *5 (finding “there can be no legitimate
 25 dispute” that defendant’s copying of plaintiff’s photographs was transformative where defendant
 26 used headshots of plaintiff’s executives to criticize its business practices); *City of Inglewood*, 2015
 27 WL 5025839, at *6, *8 (finding defendant’s videos were “highly transformative” where they used
 28 “brief portions” of plaintiff’s YouTube videos “in order to comment on, and criticize [plaintiff’s]

1 political activities"); *Hosseinzadeh*, 276 F. Supp. 3d at 45 (finding first factor "weighs heavily in
 2 defendants' favor" where defendants' videos constituted "quintessential criticism and comment");
 3 *Hughes*, 437 F. Supp. 3d at 391 (finding fair use where it was "clear from the face of [plaintiff's]
 4 Complaint that [defendant] copied portions of [plaintiff's YouTube video] for the transformative
 5 purposes of criticism and commentary"). Indeed, in *Rebolo*, Judge White dismissed infringement
 6 claims against the ***same channel*** (and others) on the grounds that it contained "plainly fair use
 7 criticism." 2022 WL 2668372, at *3.

8 In addition to transformative criticism, another "element of the first factor analysis is
 9 whether the work's 'purpose' was commercial or had a non-profit aim." *Mattel*, 353 F.3d at 803
 10 (citation omitted). "There is no doubt that a finding that copying was not commercial in nature
 11 tips the scales in favor of fair use." *Oracle*, 141 S. Ct. at 1204. Here, Plaintiff has not alleged (and
 12 cannot allege) that the channel's image serves any commercial purpose.⁶

13 Lastly, while Plaintiff alleges that the Acerthorn The True Acerthorn channel is "dedicated
 14 to harassing me, doxxing me, impersonating me" (Compl. ¶ 11), the user's good or bad faith is
 15 irrelevant to the fair use analysis. As the Supreme Court recently held, "[c]opyright is not a
 16 privilege reserved for the well-behaved." *Oracle*, 141 S. Ct. at 1204; *accord, e.g., Divine Dharma*
 17 *Meditation Int'l, Inc. v. Inst. of Latent Energy Studies*, 2021 WL 3721438, at *1 (9th Cir. Aug. 23,
 18 2021) ("[T]he Supreme Court has minimized the relevance of bad faith as part of the first factor,
 19 ... and we conclude it plays no significant role here."). In *Savage*, for example, the plaintiff alleged
 20 that the defendant's bad-faith motive for using the at-issue work undermined its fair use defense.
 21 2008 WL 2951281, at *5. The Northern District rejected that argument, explaining that "Plaintiff
 22 tries to conflate 'motive' with the purpose and character of the use, which is not permitted by the
 23 case law. Rather, even assuming the truth of plaintiff's allegations about motive, it is the manner

24
 25 ⁶ Even if the channel, and to some tiny extent the icon, served some hypothetical commercial
 26 purpose, the first factor would still "go a substantial way to support a finding of fair use" because
 27 the image is a "quintessential transformative work[] for the purpose of criticism and commentary."
 28 *City of Inglewood*, 2015 WL 5025839, at *9 (finding fair use despite assuming that the allegedly
 infringing work was used for a commercial purpose); *see also DraftExpress*, 2022 WL 16962285,
 at *3 ("Even if the [defendant's video] were considered at least partially commercial, its
 transformative nature offsets the significance of any commercialism.").

1 of use, not the motivation behind it, which must be analyzed: ‘what use was made,’ rather than
 2 ‘who is the user.’” *Id.* at *5. Here, the channel’s use of a screenshot from Plaintiff’s Livestream,
 3 while perhaps crude, is exactly the type of fair use “criticism” expressly endorsed by Section 107.

4 **B. Factor 2: Nature of the Copyrighted Work**

5 The second factor of the fair use test concerns the “nature of the copyrighted work.” 17
 6 U.S.C. § 107(2). When evaluating this factor, courts “consider whether the [allegedly infringed]
 7 work is imaginative and original, or whether it represented a substantial investment of time and
 8 labor made in anticipation of a financial return.” *Hustler*, 796 F.2d at 1153-54. “The scope of fair
 9 use is greater when ‘informational’ as opposed to more ‘creative’ works are involved.” *Id.* This
 10 factor “typically has not been terribly significant in the overall fair use balancing.” *Mattel Inc.*,
 11 353 F.3d at 803 (citation omitted). That is especially true where, as here, “transformative uses are
 12 involved.” *Sedgwick*, 2009 WL 2157573 at *6.

13 While generally of lesser importance, the second factor weighs decidedly in favor of fair
 14 use here. Plaintiff’s Livestream is essentially a factual interview of Plaintiff concerning his video
 15 game reviews. For the entirety of the nearly four-hour video, the unmoving camera is fixed on
 16 Plaintiff, who is seen sitting in front of his computer as he converses with the interviewer (who
 17 never appears on camera). The only other images shown are a handful of unaltered internet
 18 webpages. These qualities all demonstrate that the Livestream has relatively minimal creative
 19 value. The facts are similar to *DraftExpress*, where the court found that a copyrighted interview
 20 was “quintessentially factual and informational, with relatively little creativity.” 2022 WL
 21 16962285, at *4. While the court acknowledged that creativity can exist in interviews, “such as
 22 using a nontraditional format, colorful lighting, or surprising questions,” the interview at issue
 23 contained none of those elements. *Id.* It was instead designed to elicit factual information and
 24 consisted of a “simple, static close-up shot” of the interviewee speaking. *Id.* That also
 25 characterizes Plaintiff’s Livestream, which is effectively an unedited, static recording of Plaintiff
 26 engaging in a factual conversation about video games. The Livestream is therefore clearly more
 27 “informational than creative.” *Savage*, 2008 WL 2951281, at *7 (describing audio excerpts from
 28 a call-in radio talk show); *see also City of Inglewood*, 2015 WL 5025839, at *9-10 (second factor

1 supported fair use where the allegedly infringed “City Council Videos” were merely
 2 “straightforward recordings of public proceedings,” “not creative in nature,” and therefore entitled
 3 to only “very narrow copyright protection”).

4 In evaluating the second factor, courts will also consider “whether the work is published
 5 or unpublished, with the scope for fair use involving unpublished works being considerably
 6 narrower.” *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (citation omitted). The Livestream
 7 here is a published work, available for free to anyone in the world who clicks its URL. Compl. ¶
 8 5. Thus the second factor, like the first, weighs in favor of fair use.

9 C. Factor 3: Amount and Substantiality of the Portion Used

10 The third factor considers “the amount and substantiality of the portion used in relation to
 11 the copyrighted work as a whole.” 17 U.S.C. § 107(3). This factor “looks to the quantity and
 12 significance of the material used to determine whether the use is reasonably necessary to
 13 accomplish the purpose of the defendant’s work and whether it supersedes or constitutes the heart
 14 of the original work.” *Savage*, 2008 WL 2951281, at *7. If a defendant uses a copyrighted work
 15 for a transformative purpose, such as commentary or criticism, then this factor will generally weigh
 16 in favor of fair use. *See Oracle*, 141 S. Ct. at 1205. Even “copying a larger amount of material
 17 can fall within the scope of fair use where the material copied captures little of the material’s
 18 creative expression or is central to a copier’s valid purpose.” *Id.*; *see also, e.g., Mattel*, 353 F.3d
 19 at 803 n.8 (“We have ... held that entire verbatim reproductions are justifiable where the purpose
 20 of the work differs from the original.”).

21 Here, the third factor heavily favors fair use because the at-issue image uses only an
 22 infinitesimal portion of Plaintiff’s Livestream. It is a single, instantaneous snapshot from a nearly
 23 ***four-hour*** audiovisual work. If the snapshot were one second long (and it is not even that), it
 24 would account for just **0.00717%** of the Livestream. Further, the channel’s use of that screenshot
 25 was “tethered to a valid, and transformative, purpose” (*Oracle*, 141 S. Ct. at 1205): to comment
 26 on and criticize Plaintiff. The amount and purpose of the use overwhelmingly supports a finding
 27 of fair use. *See City of Inglewood*, 2015 WL 5025839, at *10 (finding fair use where defendant’s
 28 YouTube videos used only “small portions” of plaintiff’s own videos to serve the “very specific

1 and particular purpose[]” of commentary and criticism). Courts have found fair use in cases where
 2 defendants used far larger portions of a copyrighted work for a similar transformative purpose.
 3 *See, e.g., Hughes*, 437 F. Supp. 3d at 392-94 (finding fair use on a motion to dismiss where
 4 defendant used 20% of plaintiff’s YouTube video for commentary and criticism); *Hosseinzadeh*,
 5 276 F. Supp. 3d at 46 (finding fair use where defendant’s use of “three minutes and fifteen seconds
 6 of a five minute and twenty-four second video” was “reasonable to accomplish the transformative
 7 purpose of critical commentary”).

8 The Ninth Circuit’s holding in *Sony* is particularly instructive. In that case, the defendant
 9 was accused of using a screenshot of Sony’s copyrighted video game in advertisements for
 10 defendant’s own gaming-related software. 214 F.3d at 1025. With respect to the “protectability
 11 of screen shots,” the court found that “the third factor will almost always weigh against the video
 12 game manufacturer since a screen shot is such an insignificant portion of the complex copyrighted
 13 work as a whole.” *Id.* at 1028-29. Here too, the challenged image is an insignificant, split-second
 14 portion of a four-hour video, and it uses the absolute bare minimum of that video to comment on
 15 and criticize Plaintiff.

16 Further, the screenshot does not “supersede[] or constitute[] the heart of the original work.”
 17 *Savage*, 2008 WL 2951281, at *7. Similar to the screenshot in *Sony*, which represented just a
 18 “small amount of a video game” that featured multi-hour gameplay, the screenshot here is plainly
 19 “of little substance to the overall copyrighted work.” 214 F.3d at 1028. It reveals nothing
 20 whatsoever about the subject and substance of the Livestream—and certainly not anything that is
 21 even arguably “creative” in nature. Plaintiff does not allege, nor can he possibly suggest, that this
 22 usage supersedes or constitutes the “heart” of the Livestream. *See Savage*, 2008 WL 2951281, at
 23 *7 (rejecting argument that four-minute excerpt of a two-hour radio talk show constituted the
 24 “heart of the original work”); *DraftExpress*, 2022 WL 16962285, at *4 (defendant’s use of a two-
 25 second snippet of plaintiff’s interview did not comprise the “heart” of the work where the snippet
 26 consisted of “the interviewee simply stating his name”).

27
 28

1 **D. Factor 4: Effect Upon the Market or Value of the Copyrighted Work**

2 The fourth and final factor concerns “the effect of the use upon the potential market for or
 3 value of the copyrighted work.” 17 U.S.C. § 107(4). The Supreme Court recently described this
 4 as “undoubtedly the single most important element of fair use.” *Oracle*, 141 S. Ct. at 1215 n.5
 5 (citing *Harper & Row, Publishers Inc., v. Nation Enterprises*, 471 U.S. 539, 566 (1985)).
 6 Importantly, the “Supreme Court has held that critique or commentary of the original work, such
 7 as a parody, that kills demand for the original by force of its criticism … does not create a
 8 cognizable harm under the Copyright Act.” *Savage*, 2008 WL 2951281, at *8 (citing
 9 *Campbell*, 510 U.S. at 591-92). That is because “[c]opyright law is not designed to stifle critics.”
 10 *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986). Thus, “the economic effect … with which
 11 [courts] are concerned is not [the] potential [of the secondary use] to destroy or diminish the market
 12 for the original – any bad review can have that effect – but rather whether it *fulfills the demand* for
 13 the original.” *Id.* at 438 (emphasis in original). Put another way: “Biting criticism suppresses
 14 demand; copyright infringement usurps it.” *Id.*; accord, e.g., *Hosseinzadeh*, 276 F. Supp. 3d at 43
 15 (“[T]he role of the courts is to distinguish between biting criticism that merely suppresses demand
 16 and copyright infringement, which usurps it.”) (citation omitted).

17 This factor overwhelmingly supports a finding of fair use. Plaintiff has not alleged that
 18 there is *any* economic market for the Livestream or its derivatives, let alone that the channel icon
 19 somehow usurps that market or fulfills demand for his content. *See Savage*, 2008 WL 2951281,
 20 at *9 (finding fair use where “plaintiff fail[ed] to allege or suggest an impact on the actual or
 21 potential sale, marketability, or demand for the original, copyrighted work. There is no suggestion
 22 that plaintiff currently has, or ever had, any kind of market for the copyrighted work at issue
 23 outside its airing”). Even if there were a market for the Livestream, the challenged image
 24 could not possibly usurp it. The Livestream is a nearly four-hour-long audiovisual work containing
 25 a discussion about Plaintiff’s video game reviews; the image is an instantaneous and edited
 26 screenshot from that video, thus providing an entirely different viewer experience. To the extent
 27 there is any market demand for the Livestream or any content within that video (which Plaintiff
 28 has not even alleged), a single screenshot intended to comment on and criticize Plaintiff cannot

1 possibly serve that demand. Put another way: an individual who wishes to consume the content
 2 of the Livestream would not visit the Acerthorn The True Acerthorn channel as a substitute.

3 When confronted with similar non-usurping uses, courts consistently find fair use. *See,*
 4 *e.g.*, *Savage*, 2008 WL 2951281, at *9 (finding fair use where “the effect of defendants’ usage is
 5 limited to the public criticism and condemnation of the ideas within the original work, not market
 6 damage in the economic sense”); *City of Inglewood*, 2015 WL 5025839, at *12 (fourth factor
 7 supported fair use where the original works were “lengthy, unadorned videos of City Council
 8 meetings” and the allegedly infringing works were “considerably shorter” and “exclusively for the
 9 purpose of presenting [defendant’s] views and commentary on [plaintiff’s] politics”);
 10 *DraftExpress*, 2022 WL 16962285, at *5 (defendant’s video was “not a market substitute” for
 11 plaintiff’s because “someone watching the former will have a ‘very different experience’ from
 12 watching the latter”); *Hughes*, 437 F. Supp. 3d at 394 (“[A]lthough [defendant’s YouTube video]
 13 is comprised entirely of portions of [plaintiff’s YouTube video], there is no reason to think that
 14 [plaintiff’s] audience will abandon her progressive YouTube channel to watch the derisively-titled
 15 [video] on a conservative YouTube channel simply because it contains parts of her work.”);
 16 *Hosseinzadeh*, 276 F. Supp. 3d at 47 (fourth factor supported fair use because “anyone seeking to
 17 enjoy [plaintiff’s video] on its own will have a very different experience watching the [defendant’s]
 18 video, which responds to and transforms the [plaintiff’s] video from a skit into fodder for caustic,
 19 moment-by-moment commentary and mockery.”).

20 **III. THE COURT SHOULD DECLARE PLAINTIFF A VEXATIOUS LITIGANT**

21 This Court should also declare Plaintiff a “vexatious” litigant and enter a pre-filing
 22 screening order. Such sanctions are warranted given Plaintiff’s decade-long abuse of the judicial
 23 system across the country (including in his home district, where he has been declared vexatious).
 24 *Stebbins v. Stebbins*, 2013 WL 6182991. In this District, in just the last year, he has been warned
 25 at least *six times* “that if he persists in filing frivolous or meritless lawsuits, the Court may impose
 26 sanctions, bar him from filing further actions without prior approval, and/or deem him a vexatious
 27 litigant.” *Polano*, 2022 WL 2668371, at *5; *see also Rebolo*, 2022 WL 2668372, at *3; *Polano*,

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1 Dkts. 134 at 1, 143 at 1-2, and 147 at 2; *Rebolo*, Dkt. 19 at 2. Those warnings have fallen on deaf
2 ears. It is time for Plaintiff to face the consequences of his misconduct.

3 “Flagrant abuse of the judicial process cannot be tolerated because it enables one person to
4 preempt the use of judicial time that properly could be used to consider the meritorious claims of
5 other litigants.” *Strojnik v. IA Lodging Napa First LLC*, 2020 WL 2838814, at *6 (N.D. Cal. June
6 1, 2020) (citing *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990)). To prevent such
7 abuse, the “All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to
8 enter pre-filing orders against vexatious litigants.” *Molski v. Evergreen Dynasty Corp.*, 500 F.3d
9 1047, 1057 (9th Cir. 2007). While pre-filing orders are “an extreme remedy” that should not be
10 entered “with undue haste” (*id.*), courts in this District have imposed such orders where, as here,
11 a vexatious *pro se* litigant demonstrates a history of engaging in frivolous and abusive litigation.
12 See, e.g., *Drevaleva v. McDonough*, 2022 WL 15173728, at *5 (N.D. Cal. Oct. 26, 2022)
13 (declaring *pro se* plaintiff vexatious and imposing pre-filing screening order); *Strojnik*, 2020 WL
14 2838814, at *13 (same).⁷

15 Ninth Circuit courts apply a four-factor test (originally set forth in *De Long*) when
16 determining whether to declare someone a vexatious litigant and impose a pre-filing order. *Molski*,
17 500 F.3d at 1057. “First, the litigant must be given notice and a chance to be heard before the
18 order is entered. Second, the district court must compile ‘an adequate record for review.’ Third,
19 the district court must make substantive findings about the frivolous or harassing nature of the
20 plaintiff’s litigation. Finally, the vexatious litigant order ‘must be narrowly tailored to closely fit
21 the specific vice encountered.’” *Id.* at 1057 (citing *De Long*, 912 F.2d at 1147-48) (internal
22 citations omitted). Each of these factors favors an order here.

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26 ⁷ See also, e.g., *Woodruff v. Mason McDuffie Mortg. Corp.*, 2022 WL 4487011, at *7 (N.D. Cal.
27 Sept. 12, 2022) (declaring *pro se* plaintiff “vexatious” and issuing a pre-screening order); *Frost v.
28 United States*, 2020 WL 1288326, at *9 (N.D. Cal. Mar. 18, 2020) (same); *Maxwell v. MOAB Inv.
Grp., LLC*, 2014 WL 4757429, at *7 (N.D. Cal. Sept. 24, 2014), aff’d, 632 F. App’x 424 (9th Cir.
2016) (same).

1 **A. Factor 1: Notice and Opportunity to be Heard**

2 The first factor “simply requires that the litigant be given an opportunity to oppose the order
 3 before it is entered.” *Strojnik*, 2020 WL 2838814, at *7; *accord Molski*, 500 F.3d at 1058. This
 4 requirement is satisfied “as long as the party potentially subject to a pre-filing order has the
 5 opportunity to fully brief the issue.” *Id.*; *accord Frost*, 2020 WL 1288326, at *6. Plaintiff will have
 6 an opportunity to oppose this motion, so factor one is satisfied.

7 **B. Factor 2: Adequate Record for Review**

8 “The second factor of the *De Long* standard is whether the district court created an
 9 adequate record for review.” *Molski*, 500 F.3d at 1059. “An adequate record for review should
 10 include a listing of all the cases and motions that led the district court to conclude that a vexatious
 11 litigant order was needed.” *Id.*; *accord Frost*, 2020 WL 1288326, at *6 (“The second factor is
 12 procedural,” and “requires only that the court compile a list of actions and filings by the litigant.”)
 13 (citation omitted).⁸ Here, Plaintiff’s litigation record, both in and outside of this District, is replete
 14 with cases and filings evidencing his vexatious conduct. As discussed above, Plaintiff’s home
 15 district, the Western District of Arkansas, has already declared him a “vexatious” litigant and
 16 imposed a multi-faceted pre-filing screening order. *Stebbins v. Stebbins*, 2013 WL 6182991.
 17 Numerous other federal courts, including in this District, have dismissed Plaintiff’s lawsuits as
 18 patently frivolous. *Supra* at 3-4, *infra* at 22-24 (summarizing dismissals).⁹ The recently-dismissed
 19 *Polano* and *Rebolo* cases are just the latest examples.¹⁰ *Supra* at 4-7, *infra* at 22-24. Plaintiff has
 20 also filed at least three nonsensical mandamus petitions in the Ninth Circuit, all of which were
 21

22 ⁸ The record need not “list every case” ever filed by the vexatious party. *Maxwell*, 2014 WL
 23 4757429, at *5.

24 ⁹ For ease of reference and review, a list of Plaintiff’s prior frivolous cases discussed herein, along
 25 with citations to certain relevant docket entries, is included in the Mollick Declaration (*see ¶ 5*).
 26 A complete list of the more-than-forty (largely frivolous) lawsuits Plaintiff has filed in federal
 27 court can be located by searching PACER for civil cases filed by “David Stebbins” and/or “David
 28 A. Stebbins.”

29 ¹⁰ See, e.g., *Polano*, Dkts. 56, 57, 81, 88, 128, 129, 130, 134, 135, 139, 141, 142, 143, 145, 147,
 30 148, 150, 152, 153, 157-1, 158, 161, 176; *Rebolo*, Dkts. 16-19.

1 summarily denied in one-page orders. *See* 9th Cir. Case *Stebbins v. USDC-CASJ*, No. 11-72595
 2 (9th Cir. Nov. 15, 2011), Dkt. 3 (denying petition to order district court to grant his motion for
 3 default judgment against Google to confirm a non-existent “arbitration award,” even though
 4 Google was never served and no arbitration ever occurred), *Stebbins v. USDC-CAOAK*, No. 22-
 5 70132 (9th Cir. July 12, 2022), Dkt. 3 (denying petition to order district court not to consider
 6 Alphabet’s arguments as to why his case should be dismissed), and *Stebbins v. USDC-CAOAK*,
 7 No. 22-70269 (9th Cir. Jan. 26, 2023), Dkt. 3 (denying petition complaining that district court was
 8 taking too long to rule on a motion). These cases, and Plaintiff’s filings therein, establish a more-
 9 than-adequate record for review.

10 C. Factor 3: Frivolous and Harassing Filings

11 “The third factor … gets to the heart of the vexatious litigant analysis, inquiring whether the
 12 district court made ‘substantive findings as to the frivolous or harassing nature of the litigant’s
 13 actions.’” *Molski*, 500 F.3d at 1059 (quoting *De Long*, 912 F.2d at 1148). “[T]he district court must
 14 look at both the number and content of the filings as indicia of the frivolousness of the litigant’s
 15 claims.” *Id.* (cleaned up; citations omitted).

16 Plaintiff’s filing history speaks for itself. He has brought over 40 lawsuits in federal court
 17 alone.¹¹ In 2014, the Eighth Circuit noted that he had “proceeded in forma pauperis on at least
 18 sixteen complaints that proved meritless.” *Stebbins v. Stebbins*, 575 F. App’x at 705. Nearly a
 19 decade has passed, and that number has grown. A large portion, if not all, of these cases have been
 20 dismissed not just for being meritless, but patently frivolous. *See, e.g., Stebbins v. Google, Inc.*,
 21 2011 WL 5150879, at *4-5 (*sua sponte* dismissal of “clearly baseless” and “frivolous” case based
 22 on an “an indisputably meritless legal theory”); *Stebbins v. Texas*, 2011 WL 6130403, at *3
 23 (dismissing “frivolous claims” based on “fantastic or delusional scenarios that are clearly irrational
 24 and incredible”); *Stebbins v. Bradford*, 2013 WL 3366289, at *2 (dismissing “patently frivolous”
 25 claims that were based “entirely on [Plaintiff’s] suspicions and theories”); *Stebbins v. Microsoft,*
 26 *Inc.*, 2012 WL 12896360, at *1 (dismissing “frivolous lawsuit” that was “wildly untethered from

27
 28 ¹¹ This figure is based on a PACER search for civil cases filed by “David Stebbins.”

1 any valid interpretation of contract and arbitration law"); *Polano*, 2022 WL 2668371, at *5
 2 (dismissing frivolous copyright claims that "caused the Court to expend significant resources
 3 addressing [Plaintiff's] meritless claims"); *Rebolo*, 2022 WL 2668372 at *3 (dismissing frivolous
 4 copyright claims that "smack[ed] of bad faith and abuse of the Court system").

5 Plaintiff's lawsuits are not only frivolous on the merits, but are mired in nonstop,
 6 nonsensical motions that have likely wasted thousands of hours of judicial resources. He has
 7 repeatedly been admonished for this misconduct. *See, e.g., Stebbins v. Stebbins*, 2013 WL
 8 6182991, at *1 ("Not only has [plaintiff] filed numerous cases, but he has also filed over one
 9 hundred motions within those cases, some of which have been repetitive, and few of which have
 10 had any merit."); *Stebbins v. Microsoft, Inc.*, 2012 WL 12896360, at *1 ("[T]ime spent dealing
 11 with Mr. Stebbins's filings prevents the Court from addressing the genuine, vexing problems that
 12 people trust the Court to resolve quickly and fairly."); *Polano*, Dkt. 143 at 2 ("Plaintiff's
 13 improperly filed motions preempt the use of judicial resources that might otherwise be devoted to
 14 adjudicating the meritorious claims of other litigants."); *id.* Dkt. 134 at 1 (admonishing "Plaintiff's
 15 efforts to manipulate the litigation process and his blatant gamesmanship"); *id.* Dkt. 147 at 2
 16 (reiterating admonishment regarding "noncompliant and frivolous motions"); *id.* Dkt. 158 at 2 n.3
 17 (striking unauthorized filings where "Plaintiff disregarded the Court's order denying his request
 18 to file a supplemental brief"); *Rebolo*, Dkt. 19 at 2 (warning of sanctions for Plaintiff's "practice
 19 of filing noncompliant, frivolous motions"); *supra* at n.2. Plaintiff has also exhibited harassing
 20 behavior in prior lawsuits. *See Stebbins v. Stebbins*, 2013 WL 6182991, at *3 (warning Plaintiff
 21 "not to yell at court staff or use abusive language in any written or oral communication with the
 22 Court or fellow litigants"). In this case, Plaintiff has already filed an *ex parte*, anticipatory motion
 23 asking this Court to "protect me from having to litigate" against "bad faith per se arguments that I
 24 fear [Google's counsel] will make," which is frivolous on its face. Dkt. 11 ¶ 3; *see also* Dkt. 18
 25 (Google's opposition).

26 For this behavior Plaintiff has already been declared a vexatious litigant and is subject to a
 27 pre-filing screening order in the Western District of Arkansas, and he has repeatedly been warned
 28 by courts in this Circuit that he will face similar consequences if his abuses continue. *Rebolo*,

1 2022 WL 2668372, at *3 (issuing warning); *Polano*, 2022 WL 2668371, at *12-13 (same);
 2 *Stebbins v. Microsoft, Inc.*, 2012 WL 12896360, at *1 (warning “the Court will sanction [Plaintiff]
 3 next time he files a similarly frivolous complaint”); *Polano*, Dkt. 134 at 1 (“Should Plaintiff
 4 continue to dismiss and refile cases in bad faith to obtain a different result, he risks being declared
 5 a vexatious litigant in this district.”); *id.* Dkt. 143 at 1-2 (warning court may “issue an order to
 6 show cause why [Plaintiff] should not be declared a vexatious litigant subject to a pre-filing
 7 order”); *id.* Dkt. 147 at 2 (same); *Rebolo*, Dkt. 19 at 2 (same).

8 But “[n]othing has changed,” and “Plaintiff’s pattern of conduct has continued for … years,
 9 undeterred by warnings, orders, privilege revocations, or any other attempt to ensure compliance
 10 with the rules.” *Drevaleva*, 2022 WL 15173728, at *5 (declaring *pro se* plaintiff “vexatious”
 11 where numerous prior orders “expressly found Plaintiff’s cases and appeals frivolous”). It is long
 12 past time for Plaintiff to be declared a vexatious litigant in this District.

13 **D. Factor 4: The Proposed Order is Narrowly Tailored**

14 “The fourth and final factor in the *De Long* standard is that the pre-filing order must be
 15 narrowly tailored to the vexatious litigant’s wrongful behavior.” *Molski*, 500 F.3d at 1061
 16 (affirming order that “appropriately cover[ed] only the type of claims Molski had been filing
 17 vexatiously”); *see also Maxwell*, 2014 WL 4757429, at *7 (entering pre-filing order that was
 18 “limited to the type of claims the Maxwells have been filing vexatiously and will not deny” them
 19 “access to this District’s courts on any claim that is not duplicative or frivolous”). Pre-filing orders
 20 may also screen claims against particular defendants that a vexatious plaintiff has previously
 21 targeted. *See, e.g., Frost*, 2020 WL 1288326, at *9; *Drevaleva*, 2022 WL 15173728, at *6.

22 A pre-filing order is warranted here. As Judge White noted in *Rebolo*, Plaintiff has seized
 23 on copyright law “to manufacture and pursue ultimately meritless copyright infringement claims
 24 in an effort to silence online criticism.” *Rebolo*, 2022 WL 2668372, at *3; *accord Polano*, 2022
 25 WL 2668371, at *5. Because Plaintiff is an avid YouTube user, and is widely ridiculed by other
 26 YouTube users for his behavior, each of his recent and frivolous copyright lawsuits—including
 27 this case, *Rebolo*, and *Polano*—have named YouTube and/or its parent companies Google and
 28 Alphabet as defendants (in addition to many others). Plaintiff also sued Google in 2011 to confirm

1 a non-existent arbitration award. *Supra* at 3-7. Given Plaintiff's pattern of asserting frivolous
 2 claims, this Court should issue a pre-filing screening order requiring that Plaintiff obtain leave of
 3 court before filing, at minimum: (a) any future complaints against Google, YouTube, Alphabet, or
 4 their affiliates; and (b) any future copyright claims against any other defendants.

5 Additionally, this Court should prohibit Plaintiff from proceeding *in forma pauperis* in any
 6 future actions in this District except upon a showing of good cause. *See, e.g., Scott v. Weinberg,*
 7 2007 WL 963990, at *15 (W.D. Wash. Mar. 26, 2007) ("Mr. Scott should be declared a vexatious
 8 litigant and prohibited from proceeding *in forma pauperis* in any future action unless the court
 9 determines that he is in imminent danger of death or serious bodily injury"). As noted above, by
 10 2014 Plaintiff had "proceeded in forma pauperis on at least **sixteen complaints** that proved
 11 meritless," *Stebbins v. Stebbins*, 575 F. App'x at 705 (emphasis added), and that number has only
 12 increased. He was granted *IFP* status in *Polano* and *Rebolo*, both of which were ultimately
 13 dismissed for being patently frivolous. This case is the latest example.

14 Plaintiff's abuse of his *IFP* status "preempt[s] the use of judicial resources that might
 15 otherwise be devoted to adjudicating the meritorious claims of other litigants." *Polano*, Dkt. 143
 16 at 2; *see also In re Sindram*, 498 U.S. 177, 180 (1991) ("*Pro se* petitioners have a greater capacity
 17 than most to disrupt the fair allocation of judicial resources because they are not subject to the
 18 financial considerations—filing fees and attorney's fees—that deter other litigants from filing
 19 frivolous petitions"). Requiring him to pay filing fees is a narrow and appropriate measure to
 20 ensure that Plaintiff thinks twice before filing frivolous lawsuits and motions. *See Scott*, 2007 WL
 21 963990, at *5 ("If plaintiff is 'unwilling to save [his] money and prepay filing fees, such a decision
 22 may be a good indicator of the merits of the case.'") (citing *Rodriguez v. Cook*, 169 F.3d 1176,
 23 1180 (9th Cir. 1999)).

24 CONCLUSION

25 For the foregoing reasons, this case should be dismissed with prejudice and Plaintiff should
 26 be declared a vexatious litigant in the Northern District of California.
 27
 28

1 Dated: March 6, 2023

Respectfully submitted,

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3 WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

4 By: s/ Jason Mollick

5 Jason Mollick (*pro hac vice*)
6 Jeremy P. Auster (*pro hac vice*)
7 1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Telephone: (212) 999-5800
Facsimile: (212) 999-5899
jmollck@wsgr.com
jauster@wsgr.com

10 Ryan S. Benyamin
11 1900 Avenue of the Stars, 28th Floor
Los Angeles, California 90067
12 Telephone: (424) 446-6913
Facsimile: (866) 974-7329
rbenyamin@wsgr.com

13
14 *Counsel for Defendant Google LLC*